

AUG 01 2006

**EMPLOYER STATUS DETERMINATION  
DECISION ON RECONSIDERATION  
Train Travel, Inc.**

This is the decision on reconsideration of the status of Train Travel, Inc., as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

On February 22, 2005, the Board held Train Travel to be a covered employer under the Acts as of January 1, 1989 (B.C.D. 05-5).

As stated in that decision, Train Travel began operations January 1, 1989. It is wholly owned by Laurence I. Coe, who also is sole owner of Coe Rail, Inc., a covered employer under the Acts (B.A. No. 3266) since August 23, 1984. According to Mr. Coe, Train Travel:

\* \* \* operates a dinner train and a scenic train on tracks owned by Coe Rail, Inc. using rail cars owned by Coe Rail, Inc. Coe Rail, Inc. charges a fee each time the dinner train operates. Train Travel, Inc. also performs management services in the form of administrative activities including accounting, billing and payroll preparation, and maintenance functions for Coe Rail, Inc. Train Travel, Inc. had revenue from operations and fee income during 2003 of \$1,224,318. Train Travel, Inc. employed a total of 71 people during 2003 with an average employment of 30 people consisting of the following types of employees: 2 executives, 1 office manager, 1 cook, 3 part-time cooks, 2 part-time dishwashers, 10 office and reservation assistants, 2 maintenance people and 9 part-time wait staff. \* \* \*

The employees of Coe Rail, Inc. are also non-rail employees of Train Travel, Inc. and receive separate compensation for their work in each separate company. Their work for Coe Rail, Inc. consists of operating the train. In addition to providing train cars and pull service to Train Travel, Inc. transfers rail cars [sic] from CSX's main line over Coe Rail, Inc.'s track to various business[es] located along its right of way. Coe Rail, Inc. had revenue from operations during 2003 of \$198,935. Coe Rail, Inc. employed a total of 2 people during 2003 with an average employment of 2 people.

In response to a request from the Board, Train Travel provided the following additional information.

For 2005, Train Travel received \$71,204.72 from Coe Rail.<sup>1</sup>

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<sup>1</sup> This payment relates strictly to liquor sales.

Terry Warrick is the engineer for Coe Rail. He is paid entirely by Coe Rail as an employee covered under the Railroad Retirement and Railroad Unemployment Insurance Acts. He is paid 40 for hours per week. He handles the freight and maintains the engine.

Jim Burke was employed in 2005. As a Coe Rail conductor he was paid under railroad retirement by Coe Rail for 21 hours per month. He also performed work for Train Travel. In October 2005, Mr. Burke left and was replaced by Dustin Turnbull. He presently is being paid for 21 hours per week under railroad retirement by Coe Rail and the rest of his pay is from Train Travel.

The following list specifies the number of freight cars handled by Coe Rail for March 2005 through March 2006 (the total is 80 cars):

March - 0  
 April - 0  
 May - 0  
 June - 5  
 July - 9  
 August - 4  
 Sept. - 10  
 Oct. - 7  
 Nov. - 11  
 Dec. - 11  
 Jan. - 5  
 Feb. - 11  
 March - 7

The only service Train Travel performs for Coe Rail is the few hours of administrative service per month by Trish Freel. She fills in the monthly freight report for CSX, sends a bill monthly to the customer if they have received any freight from Coe Rail, calls the accountant weekly with the number of payroll hours, answers the call back from accountant of his payroll calculations, writes the payroll checks, and hands out the checks when the employees walk into the office. When a check for freight does arrive via U.S. mail, Trish deposits it. Larry Coe interviews perspective Coe Rail employees.

Coe Rail has delivered 0-11 freight cars per month. Coe Rail has an interchange agreement with CSX. The procedure for handling any freight is the following: when CSX places a car on the interchange, CSX sends a notification fax to Terry Warrick, engineer. Mr. Warrick mandates his hours, along with whenever he needs the conductor, according to the freight schedule. The engineer and conductor take the engine 4 miles to retrieve the car and make its delivery to one of the two freight customers on the line. One is 3 miles; the other is 5 miles. When the car is emptied by the customer, the customer faxes

to Mr. Warrick for the car to be picked up and taken back to the CSX interchange.

The Train Travel employees doing any work for Coe Rail have been identified above: Trish Freel, bookkeeper, who is paid by Train Travel - per the above job description for Coe Rail, she puts in 3-4 hours per month; Jim Burke, former Coe Rail conductor, who is paid 21 hours under railroad retirement by Coe Rail - the balance of his time is paid for by Train Travel; Dustin Turnbull, Coe Rail conductor, who was paid by Train Travel until May 4, 2006, and who is currently being paid both by Coe Rail and Train Travel with his time divided between the two companies; and Terry Warrick, engineer, who is paid full time under railroad retirement by Coe Rail.

The Board held Train Travel to be an employer under the Acts for the reason that it met both of two criteria: it provides "service in connection with" rail transportation and it is owned by or under common control with a rail carrier employer. If it fails to meet either criterion, it is not a covered employer.

In its request for reconsideration, Train Travel sets out three main arguments. First, it contends that the management services provided by Train Travel do not constitute service in connection with railroad transportation. The second argument maintains that if such services do constitute service in connection with railroad transportation, such services are casual and therefore do not render Train Travel a covered employer. The third argument is that if such services do constitute service in connection with railroad transportation and are not casual, then the performance of such services should be segregated and only the element of Train Travel which provides those services should be covered under the Acts. Each of Train Travel's arguments is addressed below.

Initially it should be noted that Train Travel is owned by the same individual who owns Coe Rail, a covered employer under the Acts. Accordingly, Train Travel is under common control with a rail carrier.

Train Travel's first argument is that its provision of management services to Coe Rail does not constitute service in connection with railroad transportation. However, it has been judicially upheld that the provision of management services does constitute service in connection with railroad transportation. See, e.g., Adams v. Railroad Retirement Board, 214 F. 2d 534 (9th Cir. 1954), (Accounting services, the services of a purchasing department, the service of caring for and replacing poles in an overhead trolley system, stenographic service, bridge and building service, and repair service conducted by a railroad subsidiary which was in the electric utility business constituted service in connection with railroad transportation).

Turning to the second argument on reconsideration, the Board notes that counsel for Train Travel has submitted a statement by Paul J. Dizik, a certified

public accountant, describing the consolidated gross receipts for Train Travel and Coe Rail. Gross receipts from operations are as follows.

Sales – Dinner Train	\$289,605.56
Sales – Dinner Train Entertainment	79,650.00
Sales – Dinner Train other	10,532.66
Sales – Liquor	52,054.25
Sales – Customer services	15,353.25
Sales – Tourist Rides	22,944.00
Railroad car delivery – C & O	15,635.00
Freight	6,779.93

Gross receipts from non-operations are as follows.

Royalty income – Railroad car “marks”	\$25,999.98
Interest income	27,329.16
Gain on sale of assets	252.00
Dividend income	3,986.07
Easements	117,097.50

Also submitted was a sheet labeled “Payroll Summary” for Coe Rail, which lists gross pay for the period January through June 2005 as \$2,131.88 for two employees. Another sheet, labeled “Train Travel, Inc., RRB Segregation Report January 1, 2005 to June 30, 2005,” shows 44 employees, two of whom, labeled “Bookkeeper for Dinner Train/Tourist Train” and “Bookkeeper Trainee,” respectively, worked a total of 15 hours for Coe Rail.

Regarding casual service, section 202.6 of the Board’s regulations provides that:

The service rendered or the operation of equipment or facilities by a controlled company or person in connection with the transportation of passengers or property by railroad is “casual” whenever such service or operation is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial. (20 CFR 202.6).

It is the determination of the Board that the service provided by Train Travel for Coe Rail is insubstantial. As mentioned above, Mr. Coe stated that Train Travel provides “management services in the form of administrative activities including accounting, billing and payroll preparation, and maintenance functions for Coe Rail, Inc.,” and that Coe Rail paid only \$2,131.88 for 15 hours of service by two individuals for the first six months of 2005.

Employees of Train Travel do participate in operating the train for Coe Rail. However, based on the supplementary information submitted on behalf of Train Travel, it is apparent that those individuals are treated as employees of Coe Rail when they are operating the train for Coe Rail. The balance of any service performed by Train Travel employees for Coe Rail is, as stated above, insubstantial.

Accordingly, it is determined that B.C.D. 05-5 holding Train Travel to be an employer under the Acts is reversed. Train Travel is held not be be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

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